SUPREME COURT U. S.

OCT 28 1969

No. 689

In the

Supreme Court of the United States

OCTOBER TERM, A. D. 1969.

LOUIS FAMIANO,

Petitioner,

vs.

GERALD ENYEART, a/k/a GERRY ENYEART and CHARLES ENYEART,

Respondents.

PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals for the Seventh Circuit

ANTHONY W. ROSINIA
10 South LaSalle Street
Chicago, Illinois 60603

PISER AND COX
BENJAMIN PISER
DEMPSEY A. COX,
508 Odd Fellows Building
South Bend, Indiana 46601
Attorneys for Petitioner

The Scheffer Press, Inc., 118 South Clinton Street, Chicago, Illinois

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

The Petitioner, Louis Famiano, prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit, dated and entered in this case on July 30, 1968, affirming the order of the District Court which dismissed the petitioner's action for want of prosecution. A Petition for Rehearing was timely filed and denied on August 29, 1968.

OPINIONS BELOW

There was no formal opinion of the District Court. The transcript of the open court proceedings in the District Court is reproduced in Appendix A, pp. 1a-5a, to this Petition. The District Court order dismissing the petitioner's cause of action is reproduced in Appendix B, p. 6a, to this Petition.

The opinion of the Court of Appeals is reported at 398 F2d 661. It is reproduced in Appendix C, pp. 7a-11a, to this Petition.

JURISDICTION

The judgment of the Court of Appeals affirming the District Court's order was entered on July 30, 1968. Appendix C, pp. 7a-11a. A Petition for Rehearing, timely filed, was denied on August 29, 1968. Appendix D, p. 12a. The jurisdiction of this Court is invoked under 28 U. S. Code § 1254 (1).

QUESTION PRESENTED

In a single maritime claim situation, where the claimant sues at law and demands a jury trial under the "saving to suitors" clause and the boat owner raises, by answer, the admiralty defense of limitation of liability, which issue is contested by the plaintiff, what is the effect of the contest of the limitation of liability defense?

STATUTES AND RULES OF COURT INVOLVED

The pertinent statutes involved are the "saving to suitors" clause, 28 U.S. Code § 1333, and the "limitation of liability" statute, 46 U.S. Code § 183. The texts are set forth in Appendix E, p. 12a, to this Petition.

The pertinent Federal Rules of Civil Procedure are Rule 38 (d) and (e). The texts are set forth in Appendix F, p. 13a.

STATEMENT

This diversity action was for personal injuries resulting from allegedly negligent operation of a motor boat on the waters of Lake Michigan. The complaint at law and the amended complaint at law requested a trial by jury. (Record Below, pp. 1, 33) The two defendants filed separate answers to the amended complaint with the boat owner pleading limitation of liability as a defense. (Appendix G, pp. 13a, 14a)

Plaintiff's motion to strike the admiralty defense was denied in May, 1967. (Appendix G, pp. 14a, 15a) Trial briefs were filed and discussed the issue of trial by jury. The pre-trial order listed the issues of jury trial and limitation of liability as contested issues of law. (Appendix G, p. 15a)

On September 27, 1967, plaintiff filed a motion to have all issues tried in admiralty. (Appendix G, p. 16a) The determination of this motion was reserved by the District Court until October 2, 1967, the scheduled first day of trial. (Record Below, Docket Entries, p. 4) On that day the District Court denied the plaintiff's motion and ordered all issues, except limitation of liability, tried to a jury. (Appendix A, pp. 1a-5a) In open court plaintiff requested permission to appeal the District Court's order under 28 U.S. Code § 1291 or § 1292. (Appendix A, pp. 2a, 3a) Permission was denied and plaintiff declined to proceed. On defendant's motion to dismiss pursuant to Rule 41(b), Federal Rules of Civil Procedure, the District Court dismissed the action. (Appendix B, p. 6a)

The Court of Appeals for the Seventh Circuit affirmed. It held that the determination whether to exercise jurisdiction to grant full relief in admiralty was a right reserved to the District Court's discretion. (Appendix C, p. 11a)

REASONS FOR GRANTING THE WRIT

In the present case the Court of Appeals for the Seventh Circuit has decided that the exercise of admiralty jurisdiction is a determination reserved to the District Court's discretion. In arriving at this decision, the Court of Appeals concluded that denial of admiralty jurisdiction of the whole case was correct under the principles of *Langnes* v. *Green*, 282 U.S. 531 (1931) and *Ex Parte Green*, 286 U.S. 437 (1932), even though the plaintiff (claimant) was contesting the admiralty defense of limitation of liability and was not seeking to pursue further his claim at law. The Court of Appeals stated, in addition, that to grant plaintiff's apparent waiver of jury trial, would deny to the defendants the right to trial by jury contrary to Rule 38 (d), Federal Rules of Civil Procedure.

Petitioner submits (1) that the decision below is contrary to the principles implicit in the decisions of this Court as to the effect of contest of the limitation of liabiliy issue and (2) that the decision below approves a form of combined trial contrary to principles of *Fitzgerald* v. *United States Lines Company*, 374 U.S. 16 (1963).

1. THE DECISION BELOW IS CONTRARY TO THE PRINCIPLE IMPLICIT IN THE DECISIONS OF THIS COURT AS TO THE EFFECT OF CONTEST OF THE LIMITATION OF LIABILITY ISSUE.

The "saving to suitors" clause authorized the plaintiff to sue at law. 28 U.S. Code § 1333. The defendant boat owner had the statutory right to limit his liability by

separate petition or by answer. 46 U.S. Code § 183. In this diversity action at law, after plaintiff had requested trial by jury, the boat owner raised, by answer, the admiralty defense of limitation of liability. The limitation defense was contested. The question was what is the effect of the plaintiff's contest of the limitation of liability defense.

The Court of Appeals recognized that the limitation issue had to be decided by the District Court according to admiralty principles, whether raised by separate petition or by answer. (Appendix C, p. 9a) The authority cited was *Langnes* v. *Green,* 282 U.S. 531 (1931) and Ex *Pare Green,* 286 U.S. 437 (1932). However, the Courts below ignored the effect of the contest of the limitation issue as reflected in those two decisions. It is petitioner's contention that his contest of the limitation defense drew the entire case into the exclusive and continuing power of admiralty. In the *Langnes* and *Green* decisions, upon a separate petition involving a single claimant, this Court held that contest of the limitation issue in the state court action brought the entire claim into admiralty for disposion. *Langnes* v. *Green,* 282 U.S. 531 (1931); *Ex Parte Green,* 286 U.S. 437 (1932). Contest of the limitation issue, when raised by answer in an action at law, the Court of Appeals of the Second Circuit has pointed out, draws the entire case into admiralty. *U.S.* v. *Robert Steward & Sons, Ltd.* (2 Cir., 1948) 167 F2d 308, 309 *rev'd and remanded on other grounds sub nom. Black Diamond S.S. Corp.* v. *Robert Stewart & Sons, Ltd.* 336 U.S. 386 (1949) The authority cited by the Second Circuit was *Ex Parte Green,* 286 U.S. 437 (1932). It follows that plaintiff's contest of the limitation defense drew the entire case into admiralty.

With the whole case in admiralty, the Court of Appeals erroneously concluded that exercise of admiralty jurisdiction was a determination reserved solely to the District Court's discretion. (Appendix C, p. 16a) This conclusion conflicts with the decisions of this Court in *Langnes* v. *Green*, 282 U.S. 531 (1931) and *Ex Parte Green*, 286 U.S. 437 (1932). In the *Green* cases the claimant was insisting upon his right to pursue his claim at law, and this court recognized that right if the claimant refrained from contesting the limitation issue. Contest of the limitation issue resulted in the district court exercising its admiralty jurisdiction over the entire claim. In the present case plaintiff was contesting the limitation defense, and he was not seeking to pursue further his claim at law. Under these facts the Court of Appeals held that the District Court did not have to exercise its exclusive admiralty jurisdiction over the entire case. This contradicts the direct holding of this Court that upon contest of limited liability the admiralty jurisdiction is exclusive and has to be exerted to dispose of the entire case. *Langnes* v. *Green*, 282 U.S. 531 (1931); *Ex Parte Green*, 286 U.S. 437 (1932).

The Court of Appeals' conclusion ignored the necessary implications of decisions of this Court which establish the continuing power of admiralty to dispose of all issues after denial of limitation and the right of claimants to insist upon the exercise of such power. These cases are *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.*, 273 U.S. 207 (1927); *Spencer Kellogg & Sons* v. *Hicks*, 285 U.S. 502 (1932); *Just* v. *Chambers*, 312 U.S. 383 (1941). These three cases have been recognized by the Second Circuit and Fifth Circuit as authorizing claimants, after determination of the limitation issue, to elect to pursue their claims in admiralty or at law. *In re Wood's*

Petition (2 Cir., 1956) 230 F2d 197, 199; *Pershing Auto Rentals, Inc.* v. *Gaffney* (5th Cir., 1960) 279 F2d 546, 552. In *Langnes* v. *Green*, 282 U.S. 531 (1931) the claimant was given, in effect, an election to acquiesce in limitation and pursue his law action or contest limitation and remain in admiralty. In the present case the decision to contest the limitation issue was, in effect, an election to remain in admiralty. Under the decisions of this Court, the District Court should have exercised its admiralty powers to decide the entire case.

2. THE DECISION BELOW APPROVES A COMBINED JURY-COURT TRIAL CONTRARY TO THE PRINCIPLES OF FITZGERALD v. UNITED STATES LINES COMPANY, 374 U. S. 16 (1963).

The District Court ordered a combined jury-court trial. Limitation of liability was to be tried in admiralty to the Court, and all other issues were to be tried at law to a jury. (Appendix A, p. 2a) This combined trial was contrary to the principles stated in *Fitzgerald* v. *United States Lines Company*, 374 U.S. 16 (1963). The Court of Appeals approved the trial to two triers of fact without reference to the *Fitzgerald* decision. In the *Fitzgerald* case, 374 U.S. 16 (1963), a seaman had been required to split his action, submitting part to a jury and part to a judge. The combined trial was rejected, in *Fitzgerald*, as an unnecessary complication where the jury was the only fact finder competent to try all claims. This Court declared, in *Fitzgerald*, 374 U.S. 16, 21, that only one trier of fact should be used to try what was essentially one lawsuit to dispose of one claim split conceptually into separate parts. In the present case the plaintiff's lawsuit was essentially a single claim conceptually split by the limitation of liability issue. The Court of Appeals recognized that the contested issue of limitation of liability

had to be determined in admiralty. Thus the admiralty court was the only fact finder competent to try the entire claim. With this factual situation, the decision in *Fitzgerald* v. *United States Lines Company*, 374 U.S. 16 (1963), required that the plaintiff's entire claim be tried to the one competent trier of fact, the admiralty court.

The opinion below comments that trial of all issues in admiralty would deny the defendants a trial by jury contrary to Rule 38 (d), Federal Rules of Civil Procedure. This conclusion wholly disregards the decisions of this Court as to the effect of contesting the limitation of liability issue. *Langnes V. Green*, 282 U.S. 531 (1931); *Ex Parte Green*, 286 U.S. 437 (1932). The conclusion wholly disregards the decisions of this Court as to a claimant's right to insist that his whole claim be adjudicated in admiralty. *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.*, 273 U.S. 207 (1927); *Spencer Kellogg & Sons* v. *Hicks*, 285 U.S. 502 (1932); *Just* v. *Chambers*, 312 U.S. 383 (1941). In each of the above cases it was impliedly recognized that a party could be denied a trial by jury. Reliance upon the defense of limitation of liability is a voluntary election by the boat owner, and he must accept the consequences. The Federal Rules of Civil Procedure, Rule 38 (e), specifically provide that the rules shall not be construed to create a right to trial by jury of the issues in an admiralty claim. Plaintiff's entire claim became one wholly triable in admiralty when the boat owner's answer interposed limitation of liability as a defense. Thus there could be no violation of Rule 38 (d).

CONCLUSION

In reliance upon the decisions of this Court, as interpreted by his counsel, plaintiff sought to pursue his entire claim in admiralty. The erroneous decisions below denied to plaintiff his day in court before the only trier of fact competent to dispose of the entire claim. This result is in direct conflict with the decisions of this Court. For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ANTHONY W. ROSINIA
10 South LaSalle Street
Chicago, Illinois 60603

PISER AND COX
BENJAMIN PISER
DEMPSEY A. COX,
508 Odd Fellows Building
South Bend, Indiana 46601
Attorneys for Petitioner

APPENDIX A.

ORAL STATEMENT OF DISTRICT COURT DENYING PETITIONER'S MOTION FOR ADMIRALTY TRIAL AND DISMISSING ACTION

(transcript page 211)

Now, we have pending here as yet undisposed of, a motion by the plaintiff just filed last week for the Court sitting in Admiralty to decide all of the issues in this case, and I will have to admit that all of this has caused a lot of burning of the late-night oil, because, as Mr. Beamer refers to, we land-locked members of the legal profession, we haven't much exposure in the area of admiralty law, but I have studied this considerably over the week-end, and had the benefit of the loose-leafed treatise that Mr. Cox and Mr. Piser handed up on Friday, which we've just returned with our thanks, and the Court will not grant this motion.

I am fully aware of the argument which Mr. Cox so eloquently made on Friday, that once this matter has been noticed by the Admiralty Court by the defense of liability, that the plaintiff should have a right, if he wants to permit the whole matter to be decised there, but I cannot believe that

(transcript page 212)

the Courts will ultimately hold that he can force that position, if to do so, he thereby denies what is to the defendants an unequivocal right of a trial by jury on the law side of the Court, and I understand the arguments that are made on both sides.

I appreciate the sincerity with which they are advanced. If this Court is to err, I would rather err on the side of requiring the plaintiff to live with this jury that he demanded at the outset and has kept on demanding for all of the months and months that this case has been pending,

that I would to deny to the defendants their right to a trial by jury, which the plaintiff would now seek to deny them, which the Federal Rules contemplate cannot now be taken from them without their assent.

As I read the file over the week-end, too, I found one little gem that I thought was very much in point, and it said that the defendant, Charles Enyeart's, case will have to be tried on the law side of the Court with a jury, because of the plaintiff's claim against the defendant is not subject to limitation, and that gem is out of one of the

(transcript page 213)

plaintiff's earlier briefs; so we deny the motion of the plaintiff, and this case will go forward on the law side to a jury on all issues except the question of limitation of liability.

Mr. Co[illegible]?

Mr. Cox: Your Honor, if Your Honor please, in the light of the Court's ruling, we would ask the Court to consider a final order denying admiralty jurisdiction and permit an appeal from that order.

The Court: No. I'm not going to permit an interlocutory appeal. We are all revved-up. We have got a jury here; the witnesses are available, and we're going to hear this case.

Mr. Cox: Would you give me two minutes?

The Court: Yes, sir.

(Whereupon, there was a pause in the proceedings.)

The Court: I don't mean to hurry you. I think we will take five minutes, if it is a matter of importance, and I believe it to be.

Let's take a very brief recess. Court stands in recess.

(transcript page 214)

(Whereupon, following a brief recess, the following proceedings were had:)

The Court: Mr. Cox?

Mr. Cox: If Your Honor please, in the light of the decision of the Court that this case has to be tried to a

jury, the plaintiff feels that this is a denial of the Court of Admiralty jurisdiction, to which he is entitled, and he respectfully declines to proceed, and in this he will appeal to the Seventh Circuit.

The Court: Mr. Defendant, where does that leave you?

Mr. May: I hate to ask for a couple of minutes, Your Honor, but I would like to—I have never had this happen to me before.

The Court: I haven't either. Lots of things have happened in this case that haven't happened before.

Mr. May: I wonder if we could have a couple of minutes?

The Court: All right. We will do this all over.

Court stands in recess.

(transcript page 215)

(Whereupon, following a short recess, the following proceedings were had:)

Mr. Cox: If your Honor please,—

The Court: Mr. Cox?

Mr. Cox: In discussing your ruling with you, I believe I made a reference to asking you, the Court, to consider its order a final order.

That would, in my understanding, come under 28 USC 1291, and we'd also like the record to show we have asked for the Court to consider its interlocutory order under 1292.

The Court: The answer is the same under both 1291 and 1292.

The request is denied.

Mr. Cox: Yes, sir. I wanted it for the record.

The Court: The record shall be very clear.

Mr. May: Your Honor, our position is, the defendants are ready, willing and able to proceed at this time, and in view of the plaintiff's refusal to proceed at this time, we are therefore asking the Court to dismiss.

(transcript page 216)

the cause pursuant to Rule 41.

The Court: I had better read this. This is Rule 41(b)—

Mr. May: (b), yes, Your Honor.

The Court: (Continuing)—I am now looking at. (Whereupon, there was a pause in the proceedings.)

Mr. May: Just one thing further; as far as the defendants are concerned, Your Honor, we are ready and willing to proceed.

One of the defendants in this case, Charles Enyeart, is of military service age, and we feel that in the very near future that he will probably be called upon to serve under Uncle Sam, and if his case were in any way to be postponed or delayed, it woulld work to the defendants' prejudice.

The Court: Well, I think it wouldn't be a mistake to state at this time that this action was filed originally more than two years ago, on September 22nd, 1965.

There have been many proceedings. There was an Amended Complaint filed August 16, 1966. We have had several sessions on this

(transcript page 217)
matter, all upon the original Complaint, the Amended Complaint, which proceeded on the law side, were in each case a request for a trial by jury. This case was in fact scheduled for trial last June 28th, now more than three months ago, and about that time, in fact, it was not until three days later—notice was May 28, 1967—that this trial date was then rescheduled, and the plaintiff was ordered to prepare and file a pre-trial order, which, quite some time later, was drafted and submitted.

Objections were made and finally it was re-drafted by Counsel for the Defendant at the Court's direction. That was in August.

In the pre-trial order that the Plaintiff submitted, it was designated as a law case, looking toward the trial by jury. Reference was so made, and Plaintiff submitted a draft of the pre-trial order in August.

And, finally, on September 27, 1967, which was last Thursday, about three court days ago, Plaintiff came in

with a motion that this action be tried in admiralty without a jury on the grounds that a defendant has asserted the defense of limitation of liability,

(transcript page 218)
which the Court considered with Counsesl in Chambers on Friday, studied over the week-end, and on which we have since announced our decision, that the motion would not be granted, and the Plaintiff refuses now to go forward, and the Defendant, being here, proclaiming that he is ready to proceed, demanded trial, now moves for dismissal of the action under the provisions of Rule 41 (b), the Federal Rules of Civil Procedure, and under all of the foregoing, and under the circumstances, the Court has no alternative except to grant that motion, and accordingly, this cause of action is now dismissed pursuant to the provisions of Rule 41 (b).

There being nothing further, we will stand in adjournment.

APPENDIX B.

ORDER DISMISSING CAUSE OF ACTION

(Docket Entries pages 4-5)

Parties present in court in person and by counsel. Cause ready for trial. Court rules that Pltf's. motion for Admiralty Court to decide all issues be Denied. Pltf. moves the Court for a final order denying admiralty jurisdiction in this cause and permitting an appeal from that order. Interlocutory appeal Denied by the Court. The Pltf. respectfully declines to proceed with the trial of this cause to a jury. Defts. move for a dismissal of this cause of action under the provisions of Rule 41 (b), F.R. Civ. P. Motion is granted and this cause of action is now dismissed. Grant, J.

APPENDIX C.

OPINION OF COURT BELOW AFFIRMING ORDER OF DISMISSAL
July 30, 1968

Before Schnackenberg, Swygert and Cummings, *Circuit Judges.*

Schnackenberg, *Circuit Judge.* Louis Famiano, plaintiff, has appealed from the district court's order dismissing for want of prosecution this diversity action, brought to recover damages for personal injuries claimed to have been suffered while he fell from water skis, while being towed behind a motor boat then being operated on Lake Michigan by Charles Enyeart, defendant. The motor boat was owned by his father, Gerald Enyheart, another defendant. The court's order was entered pursuant to Rule 41 (b), Federal Rules of Civil Procedure, when on the day fixed for trial, plaintiff refused to proceed with trial by jury.

Plaintiff filed his complaint at law alleging negligence on the part of both defendants, and requested trial by jury. Defendant Gerald Enyeart filed a joint answer with defendant Charles Enyeart and then moved for summary judgment. That motion was denied. Thereafter, plaintiff filed an amended complaint at law which requested trial by jury. Defendants filed separate answers which denied negligence and pleaded affirmative defenses. The answer of defendant Gerald Enyeart, also raised the admiralty defense of limitation of liability.[1] Plaintiff's motion to strike this defense was denied by the court, which then listed the defense as a contested issue of law in its pretrial order. A date for that by jury was set. Plaintiff argued in his pretrial brief that he was entitled to jury trial as to both defendants under the "saving to suitors" clause, 28 U.S.C. § 1333. Thereafter, plaintiff moved that

[1]Provided by 46 U.S.C. § 183.

all issues be tried by the court in admiralty. The court's ruling on this motion was on the scheduled first day of trial, at which time the motion was denied. Plaintiff requested an appeal which was denied, and upon his refusal to proceed to trial, the court granted defendant's motion to dismiss.

The error relied upon in this appeal is that the district court denied plaintiff the right to full relief in admiralty by declining to hear all issues in admiralty other than the limitation of liability defense. Counsel for plaintiff contends that the admiralty defense drew his entire action at law into admiralty. He asserts that he was the one to determine whether full relief from admiralty was desired and had the right to insist upon the exercise of such jurisdiction. Further, he contends the court's ruling was appealable as a final order, an interlocutory order modifying or dissolving an injunction [28 U.S.C. § 1292 (a) (1)], or as an order involving a controlling question of law [28 U.S.C. § 1292 (b)].

Defendant's counsel asserts that plaintiff's request for trial by jury cannot be waived over objection and that when the admiralty defense is raised, as here, the question of liability is tried to a jury and questions relative to the defense are reserved to the court.

The issues raised are whether the admiralty defense asserted by defendant Gerald Enyeart, excludes plaintiff's right to trial by jury, and whether that ruling may be appealed as (1) a final decision denying admiralty jurisdiction, (2) an interlocutory order modifying or dissolving an injunction, or (3) as permitted by the court under 28 U.S.C. § 1292 (b), an order involving a controlling question of law. However, the question as to an appeal involving a controlling question of law has been waived by plaintiff's failure to comply with 28 U.S.C. § 1292 (b), pertaining to interlocutory appeals.

1. The statute which provides the admiralty defense, 46 U.S.C. § 183, reads in part as follows:

> (a) The liability of the owner of any vessel, * * * for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge or such owner or owners, shall not * * * exceed the amount or value of the interest of such owner in such vessel, * * *.

The determination of this limitation must be made by the district court according to principles of admiralty, whether raised by separate petition or by answer to a complaint for damages. *Langnes* v. *Green,* 282 U.S. 531 (1931) and *Ex Parte Green,* 286 U.S. (1932). In both *Langnes* and *Green,* Green had sought his remedy in a state court for damages alleged to have been incurred when he was injured while employed on Langnes' boat. Langnes petitioned the district court for limitation of liability. The district court enjoined further proceedings in the state court and, though it soon appeared that Green was the sole claimant, the court disallowed his motion to dissolve the injunction. Holding that this ruling was an abuse of judicial discretion, the Supreme Court remanded the cause to the district court for it to permit further proceedings in the state court while reserving its jurisdiction of exclusively admiralty issues. Thereafter, in the state court, the admiralty issue was contested resulting in the return of the case to the Supreme Court. In *Green* at 438-440, the Court said:

> "We held [in *Langnes* v. *Green, supra*] that the action was properly brought in the state court under § 24 (3) of the Judicial Code, U.S.C., Title 28, § 41 (3), which saves to suitors in all cases of admiralty 'the right of a common-law remedy where the common law is competent to give it,' and that the petition for a limitation of liability also was properly brought in the federal district court. * * * we said that a case was presented for the exercise of the sound discretion of the district court whether to dissolve the restraining order and permit the state court to proceed, or to retain complete jurisdiction; and, upon considera-

tion of the matter, we held that such discretion should have been exercised so as to permit the state court to proceed.

* * *

"It is clear from our opinion that the state court has no jurisdiction to determine the question of the owner's right to a limited liability, and that if the value of the vessel be not accepted as the limit of the owner's liability, the federal court is authorized to resume jurisdiction and dispose of the whole case."

Thus, when in the exercise of its diversity powers a district court has jujrisdiction of a common law cause of action for trial by jury in which the limit of liability is contested according to admiralty law, the rights of the parties may be determined by the jury except for the right to the defense, in admiralty which must be determined by the court in admiralty. This is limited as the court states in *Langnes, supra,* at 540:

"Needless to say that if the case for a limitation of liability assumes such a form that only a federal court is competent to afford relief, the jurisdiction of that court is exclusive and must be exerted to dispose of the entire cause; and the action in the state court may not be further prosecuted."

In the case at bar, the limitation was raised by defendant's answer so that it was necessary for the court, having jurisdiction in admiralty and in common law actions in diversity, to rule in terms of the "saving to suitors" clause, 28 U.S.C. § 1333.[2] This it did. In view of the principles announced in *Langnes* and *Green,* we hold that ruling was correct.

Plaintiff's action was in diversity for trial by a common-law jury except for defendant's defense limiting lia-

[2] The district courts shall have original jurisdiction, exclusive of the courts of the State, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

bility. The court had taken jurisdiction of that question on plaintiff's motion to strike, and, denying that motion, held the question as a contested issue of law. Therefore, the case had not assumed such form as to exclude the right to trial by jury. If the merits of the defense were contested, according to its pretrial order the court, upon hearing the evidence, had exclusive jurisdiction to determine the question.

Contrary to plaintiff's contention that he was the one to determine whether full relief from admiralty was desired, the right to exercise jurisdiction is a determination reserved to the court's discretion.

Both parties were entitled to a jury trial on all issues except the admiralty defense—which, were the court to grant plaintiff's apparent waiver of a jury by his motion to have all issues heard in admiralty, would deny the defendants the right to trial by jury contrary to Rule 38 (d), Federal Rules of Civil Procedure. Thus, the ruling of the court, giving expression to the "savings to suitors" clause, was fair, just and equitable to all litigants.

2. With respect to the court's denial of an appeal by plaintiff from "a final order denying admiralty jurisdiction", or as an interlocutory appeal permitted by 28 U.S.C. § 1292 (a) (1) as being in substance the "equivalent to the modification or dissolution of an injunction", we have examined each of the grounds advanced and find each without merit.

For the reasons set forth above, the order of the district court dismissing plaintiff's action for want of prosecution is affirmed.

APPENDIX D.

DENIAL OF PETITION FOR REHEARING

It Is Ordered by the Court that the petition for rehearing filed in the above entitled cause be and the same is hereby denied.

APPENDIX E.

STATUTES INVOLVED

Title 28, section 1333, United States Code, reads as follows:

> "The district courts shall have original jurisdiction, exclusive of the courts of the States, of (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

Title 46, Section 183 (a), United States Code, reads as follows:

> "(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, manner, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

APPENDIX F.

RULES OF COURT INVOLVED

Federal Rules of Civil Procedure, Rule 38:

"(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5 (d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

"(e) Admiralty and Maritime Claims. These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9 (h). As amended Feb. 28, 1966, eff. July 1, 1966.

APPENDIX G.

PLEADINGS AND ORDERS INVOLVED

(1) Boatowner's Defense of Limitation of Liability

(transcript page 53)

The defendant, Gerald Enyeart, for his sixth paragraph of defense alleges and says:

(transcript page 54)

1. That the occurrence complained of in plaintiff's amended complaint at law occurred on Lake Michigan, one of the Great Lakes, and a navigable waterway.

2. That this defendant was the owner of the vessel described in plaintiff's amended complaint at law as an outboard motor boat and that at the time of the occurrence in question said vessel was of the value of Three Thousand Eight Hundred Dollars ($3,800.00).

3. That the events and occurrence described in plaintiff's amended complaint at law occurred without the privity or knowledge of this defendant.

Wherefore, this defendant prays the court that should judgment be entered against him, his liability be limited to the total sum of Three Thousand Eight Hundred Dollars (3,800.00).

(2) Motion to Strike Defense of Limitation Liability

(transcript page 83)

Sixth Defense. Plaintiff moves that defendant, Gerald Enyart's, Sixth Defense being in the nature of limitation of liability be stricken for the reason that said defendant has not pleaded said limitation nor filed the requisite proceedings to limit his liability within six months of the time defendant had notice of a claim by plaintiff of a kind that was, might or could be subject to limitation, contrary to the requirements of 46 USC 181-189; United States Supreme Court Rules of Admiralty Practice, 51-57, 28 USC; and the decisions in *Odegard* v. *Quist,* 199 F. Supp., 449 and *Petition of American MARC, Inc. for Exonoration, etc.,* 224 F. Supp., 574.

(3) Order Denying Motion to Strike

(transcript page 127)

Defendant Gerald Enyeart's amended answer, filed February 21, 1967, contains a sixth affirmative defense which alleges that this defendant's potential liability should be limited to a maximum amount of $3,800.00. By motion of March 29, 1967, plaintiff has moved the Court to strike said sixth defense.

It is hereby Ordered that

(1) plaintiff's motion to strike the Sixth Defense of defendant Gerald Enyeart be, and the same hereby is Denied;

(2) the attorneys for the several parties to this action appear before the undersigned Judge of this Court, at chambers in South Bend, on Monday, May 29, 1967, at 2:30 P.M., C.D.T., prepared to advise the Court as to what changes, if any, are needed to make the pleadings conform to the applicable Admiralty law. It is expected that the parties will have conferred prior to the time of this hearing in an attempt to come to an agreement on the answers to questions including, but not limited to, whether or not comparative negligence law should be applied, whether or not any or all of the defenses which have been alleged are now applicable (excluding the question of limitation of liability), and what procedure should be followed in determining whether or not defendant Gerald Enyeart's liability should be limited to the value of the boat.

The Court would advise the parties that it fully intends for this case to be tried on the date for which it is now set. To that end, it will require trial briefs to be submitted at least one week in advance of tria'

(4) Pre-Trial Order, Contested Issues of Law

(transcript page 173)

H. The contested issues of law are:

1. The jurisdiction of this Court to try this case as a common law case or as an admiralty case.

2. Whether Federal Rules of Civil Procedure and Evidence apply or Admiralty Rules of Practice and Procedure and Evidence apply in the trial of this case.

3. Whether plaintiff is entitled to a jury trial in his suit against both defendants.

(transcript page 174)

6. Defendant Gerald Enyeart's right to limit his liability.

(5) Motion to Try all Claims in Admiralty

(transcript page 200)

You will take notice that the plaintiff will move the Court at the Courtroom, United States Post Office, South Bend, Indiana, at a time to be fixed by the Court, for an order that all claims and defenses in the above styled action be tried by the Court in admiralty, without a jury, on the grounds that a defendant has asserted the defense of limitation of liability; that the asserted defense is justicable only in admiralty and draws the entire litigation into admiralty; that no stipulation or agreement has been executed as to separate trial of the admiralty defense of limitation of liability; and that the plaintiff elects to have all issues tried in admiralty.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 16592 SEPTEMBER TERM, 1967 APRIL SESSION, 1968

LOUIS FAMIANO,
Plaintiff-Appellant
v.
GERALD ENYEART, also known as GERRY ENYEART, and CHARLES ENYEART,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

JULY 30, 1968

Before SCHNACKENBERG, SWYGERT and CUMMINGS, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Louis Famiano, plaintiff, has appealed from the district court's order dismissing for want of prosecution this diversity action, brought to recover damages for personal injuries claimed to have been suffered when he fell from water skis, while being towed behind a motor boat then being operated on Lake Michigan by Charles Enyeart, defendant. The motor boat was owned by his father, Gerald Enyeart, another defendant. The court's order was entered pursuant to Rule 41 (b), Federal Rules of Civil Procedure, when on the day fixed for trial, plaintiff refused to proceed with trial by jury.

Plaintiff filed his complaint at law alleging negligence on the part of both defendants, and requested trial by jury. Defendant Gerald Enyeart filed a joint answer with defendant Charles Enyeart and then moved for summary judgment. That motion was denied. There-

after, plaintiff filed an amended complaint at law which requested trial by jury. Defendants filed separate answers which denied negligence and pleaded affirmative defenses. The answer of defendant Gerald Enyeart, also raised the admiralty defense of limitation of liability.[1] Plaintiff's motion to strike this defense was denied by the court, which then listed the defense as a contested issue of law in its pretrial order. A date for trial by jury was set. Plaintiff argued in his pretrial brief that he was entitled to jury trial as to both defendants under the "saving to suitors" clause, 28 U.S.C. § 1333. Thereafter, plaintiff moved that all issues be tried by the court in admiralty. The court's ruling on this motion was on the scheduled first day of trial, at which time the motion was denied. Plaintiff requested an appeal which was denied, and upon his refusal to proceed to trial, the court granted defendant's motion to dismiss.

The error relied upon in this appeal is that the district court denied plaintiff the right to full relief in admiralty by declining to hear all issues in admiralty other than the limitation of liability defense. Counsel for plaintiff contends that the admiralty defense drew his entire action at law into admiralty. He asserts that he was the one to determine whether full relief from admiralty was desired and had the right to insist upon the exercise of such jurisdiction. Further, he contends the court's ruling was appealable as a final order, an interlocutory order modifying or dissolving an injunction [28 U.S.C. § 1292 (a) (1)], or as an order involving a controlling question of law [28 U.S.C. § 1292 (b)].

Defendant's counsel asserts that plaintiff's request for trial by jury cannot be waived over objection and that when the admiralty defense is raised, as here, the question of liability is tried to a jury and questions relative to the defense are reserved to the court.

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[1] Provided by U.S.C. §183.

The issues raised are whether the admiralty defense asserted by defendant Gerald Enyeart, excludes plaintiff's right to trial by jury, and whether that ruling may be appealed as (1) a final decision denying admiralty jurisdiction, (2) an interlocutory order modifying or dissolving an injunction, or (3) as permitted by the court under 28 U.S.C. § 1292 (b), an order involving a controlling question of law. However, the question as to an appeal involving a controlling question of law has been waived by plaintiff's failure to comply with 28 U. S.C. § 1292 (b), pertaining to interlocutory appeals.

1. The statute which provides the admiralty defense, 46 U.S.C. § 183, reads in part as follows:

> (a) The liability of the owner of any vessel, * * * for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, * * * exceed the amount or value of the interest of such owner in such vessel, * * *.

The determination of this limitation must be made by the district court according to principles of admiralty, whether raised by separate petition or by answer to a complaint for damages. *Langnes* v. *Green,* 282 U.S. 531 (1931) and *Ex Parte Green,* 286 U.S. 437 (1932). In both *Langnes and Green,* Green had sought his remedy in a state court for damages alleged to have been incurred when he was injured while employed on Langnes' boat. Langnes petitioned the district court for limitation of liability. The district court enjoined further proceedings in the state court and, though it soon appeared that Green was the sole claimant, the court disallowed his motion to dissolve the injunction. Holding that this ruling was an abuse of judicial discretion, the Supreme Court remanded the cause to the district court for it to permit further proceedings in the state court while reserving its jurisdiction of exclusively admiralty issues. Thereafter in the state court, the admiralty issue was contested resulting in the return of the case to the Supreme Court. In *Green* at 438-440, the Court said:

"We held [in *Langnes* v. *Green, supra*] that the action was properly brought in the state court under § 24 (3) of the Judicial Code, U.S.C., Title 28, § 41 (3), which saves to suitors in all cases of admiralty 'the right of a common-law remedy where the common law is competent to give it,' and that the petition for a limitation of liability also was properly brought in the federal district court. * * * we said that a case was presented for the exercise of the sound discretion of the district court whether to dissolve the restraining order and permit the state court to proceed, or to retain complete jurisdiction; and, upon consideration of the matter, we held that such discretion should have been exercised so as to permit the state court to proceed.

"But we also said * * * that the right of petitioner to a limited liability might be brought into question in the state court, or to the case otherwise assume such form in that court as to bring it within the exclusive power of a court of admiralty.

* * *

"It is clear from our opinion that the state court has no jurisdiction to determine the question of the owner's right to a limited liability, and that if the value of the vessel be not accepted as the limit of the owner's liability, the federal court is authorized to resume jurisdiction and dispose of the whole case."

Thus, when in the exercise of its diversity powers a district court has jurisdiction of a common law cause of action for trial by jury in which the limit of liability is contested according to admiralty law, the rights of the parties may be determined by the jury except for the right to the defense in admiralty which must be determined by the court in admiralty. This is limited as the court states in *Langnes, supra,* at 540:

"Needless to say that if the case for a limitation of liability assumes such a form that only a federal

> court is competent to afford relief, the jurisdiction of that court is exclusive and must be exerted to dispose of the entire cause; and the action in the state court may not be further prosecuted."

In the case at bar, the limitation was raised by defendant's answer so that it was necessary for the court, having jujrisdiction, in admiralty and in common law actions in diversity, to rule in terms of the "saving to suitors" clause, 28 U.S.C. § 1333.[2] This it did. In view of the principles announced in *Langnes and Green,* we hold that ruling was correct.

Plaintiff's action was in diversity for trial by a common-law jury except for defendant's defense limiting liability. The court had taken jurisdiction of that question on plaintiff's motion to strike, and, denying that motion, held the question as a contested issue of law. Therefore, the case had not assumed such form as to exclude the right to trial by jury. If the merits of the defense were contested, according to its pretrial order the court, upon hearing the evidence, had exclusive jurisdiction to determine the question.

Contrary to plaintiff's contention that he was the one to determine whether full relief from admiralty was desired, the right to exercise jurisdiction is a determination reserved to the court's discretion.

Both parties were entitled to a jury trial on all issues except the admiralty defense—which, were the court to grant plaintiff's apparent waiver of a jury by his motion to have all issues heard in admiralty, would deny the defendants the right to trial by jury contrary to Rule 38 (d), Federal Rules of Civil Procedure. Thus, the ruling of the court, giving expression to the "saving to

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[2] The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

suitors" clause, was fair, just and equitable to all litigants.

2. With respect to the court's denial of an appeal by plaintiff from "a final order denying admiralty jurisdiction", or as an interlocutory appeal permitted by 28 U.S.C. § 1292 (a) (1) as being in substance the "equivalent to the modification or dissolution of an injunction", we have examined each of the grounds advanced and find each without merit.

For the reasons set forth above, the order of the district court dismissing plaintiff's action for want of prosecution is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Thursday, August 20, 1968

Before

Hon. ELMER J. SCHNACKENBERG, Circuit Judge
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge

LOUIS FAMIANO, Plaintiff-Appellant, vs. GERALD ENYEART, a/k/a GERRY ENYEART and CHARLES ENYEART, Defendant-Appellee.	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 16592	

It Is Ordered by the Court that the petition for rehearing filed in the above entitled cause be and the same is hereby denied.